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88-630

No. 88-630

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BENJAMIN P. COX, and
BENNIE J. HAYS,

Petitioners,

v.

STATE OF ALABAMA,

Respondents.

On Petition For Writ Of Certiorari
To The Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment, which prohibits the states from denting any person equal protection of law, limit criminal defendants in the exercise of their peremptory challenges during the selection of a petit jury.

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Fourteenth Amendment of the United States Constitution i,ii,1,2,3,4

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment prohibits the states from denying any person equal protection of law. In Batson vs. Kentucky, 476 U.S. 79 (1986), and the cases cited within, this Court emphasized that the purpose of the Fourteenth Amendement was to end "governmental discrimination". It is clear from the wording of the Equal Protection Clause and this Court's analysis in Batson that the Fourteenth Amendment prohibits official governmental descrimination and has no appliction to a criminal defendant in the exercise of peremptory challenges.

REASONS FOR DENYING THE WRIT

I. The Fourteenth Amendment Prohibits Governmental Discrimination And Has No Aplication To A Criminal Defendant In The Exercise Of Peremptory Challenges.

Although not stated in their brief, the prosectuion informally calls this a "reverse Batson" case. The State urges that, based on Batson vs. Kentucky, supra, this Court rule that the Constitution limits a criminal defendant in the exercise of peremptory challenges.

The Batson decision is grounded entirely on the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides "nor shall any state... deny to any person within its jurisdiction the equal protection of the laws". (emphasis added)

In Batson, this Court repeatedly emphasized that the purpose of the Fourteenth Amendment was to end official governmental discrimination:

> In Swain v. Alabama, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race or participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S., at 203-204, 13 L Ed 2nd 759, 85 S Ct 824. This principal has been "consistently and repeatedly" reaffirmed, id., at 204, 13 L Ed 2d 759, 85 S Ct 824, in numerous decisions of this Court both preceeding and following Swain. We reaffirm the principle today. 476 U.S. at 84
>
> In Strauder the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Id., at 306-307, 25 L Ed 664. 476 U.S. at 85
>
> The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, Strauder, supra, at 305, 25 L Ed 664, or on the false assumption that members of his race as a group are not qualified to serve as jurors, see Norris vs. Alabama, 294 U.S. 587, 599, 79 L Ed 1074, 55 S Ct 579 (1935); Neal vs. Delaware, 103 U.S. 370, 397, 26 L Ed 567 (1881). 476 U.S. at 86
>
> The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through

> its administrative officers in effecting the prohibited discrimination." Norris vs. Alabama, 294 U.S., at 589, 79 L Ed 1074, 55 S Ct 579; see Hernandez vs. Texas, 347 U.S. 475, 478-479, 98 L Ed 866, 74 S Ct 667 (1954); Ex parte Virginia, 100 U.S., at 346-347, 25 L Ed 676.
> 476 U.S. at 88
>
> Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, Hill vs. Texas, 316 U.S. 400, 406, 86 L Ed 1559, 62 S Ct 1159 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," Avery vs. Georgia, 345 U.S. 559, 562, 97 L Ed 1244, 73 S Ct 891 (1953); see McCray vs. New York, supra, at 965, 968, 77 L Ed 2d 132,103 S Ct 2438 (Marshall, J., dissenting from denial of certiorari); see also Alexander vs. Louisiana, 405 U.S. 625, 632, 31 L Ed 2d 536, 92 S Ct 1221 (1972).
> 476 U.S. at 88-89

The Fourteenth Amendment prohibits the states from discriminating against its citizens. It cannot be construed to limit a criminal defendant in the exercise of peremptory challenges.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment prohibits official governmental discrimination. It does not apply to criminal defendants exercising peremptory challenges.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing to Don Siegelman, Alabama Attorney General, Ed Carnes, Sandra Stewart, Assistant Alabama Attorneys General, 11 South Union Street, Montgomery, AL 36130, and Chris W. Galanos, District Attorney, Mobile County court house, by placing same in the United States Mail, first class postage pre-paid this 30 day of November, 1988.

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FILING STATEMENT

Pursuant to Rule 28 of the Rules of the Supreme Court, I hereby certify that the Brief in Opposition and Motion For Leave to Appeal in Forma Pauperis in the above case were deposited in the City of Mobile Post Office on November 30, 1988, properly addressed to the Court with first class postage prepaid.

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Sworn and subscribed to before me this 30th day of November, 1988.

Michelle Bader
NOTARY PUBLIC
MY COMMISSION EXPIRES: 10/23/90

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing to Don Siegelman, Alabama Attorney General, Ed Carnes, Sandra Stewart, Assistant Alabama Attorneys General, 11 South Union Street, Montgomery, AL 36130 and Chris W. Galanos, District Attorney, Mobile County court house, by placing same in the United States Mail, first class postage postage prepaid this 30 day of November, 1988.

NEIL HANLEY